

SERVICE DATE - November 8, 1996

SURFACE TRANSPORTATION BOARD¹

DECISION

Finance Docket No. 31591

WHEELING ACQUISITION CORPORATION--ACQUISITION AND OPERATION
EXEMPTION--LINES OF NORFOLK & WESTERN RAILWAY COMPANY

Decided: November 4, 1996

By petition filed August 15, 1996, Wheeling & Lake Erie Railway Company (W&LE) requests that this proceeding be reopened and that a condition, imposed in 1990 in connection with W&LE's acquisition of these rail lines, be removed. The condition prevents the carrier from selling or modifying rail properties until completion of procedures under the National Historic Preservation Act (NHPA). The request will be granted.

BACKGROUND

In 1990, W&LE's predecessor, Wheeling Acquisition Corporation (WAC), acquired 576 miles of rail lines and 264 miles of incidental trackage rights from Norfolk & Western Railway Company (N&W), pursuant to the class exemption for rail line sales at 49 CFR 1150.31 and 1150.35.² In accordance with the ICC's rules then in effect, prior to filing its exemption notice, WAC consulted with the State Historic Preservation Officers (SHPOs) in Ohio, Pennsylvania, West Virginia, and Maryland, the states where the involved rail lines are located. WAC provided each SHPO with copies of its exemption notice and a description of the rail properties. In the exemption notice published in the Federal Register, the ICC imposed its customary historic preservation condition requiring the purchaser to preserve all sites and structures on the line that were 50 years old or older until the section 106 process of NHPA was completed.

W&LE contends that the condition should be removed because the line sale was consummated more than 6 years ago and any future disposition or alteration of rail properties would be the result of W&LE's continuing ownership and management of assets rather than the result of the original purchase from N&W. Moreover, W&LE states that the ICC subsequently amended its rules in Implementation of Environmental Laws, 7 I.C.C.2d 807 (1991), to provide that no historic report would be required, and no historic condition would be imposed, for line transfers where further agency approval would be required to abandon any service

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission and transferred certain functions to the Surface Transportation Board (Board). This decision relates to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10901.

² See Wheeling Acquisition Corporation--Acquisition and Operation Exemption--Lines of Norfolk & Western Railway Company, Finance Docket No. 31591 (ICC served Feb. 6, 1990). Wheeling Acquisition Corporation changed its name to Wheeling & Lake Erie Railway Company on May 1, 1990.

and there are no plans to dispose of or alter historic properties that are subject to the agency's jurisdiction. See 49 CFR 1105.8(b)(1).

W&LE indicates that, because the original transaction did not include any plans to alter or dispose of historic properties and because there are no current intentions to do so, the Board would not impose a historic preservation condition today. W&LE has attached to its petition a certification sent to each SHPO involved, confirming that the relevant exception criteria in 49 CFR 1105.8(b)(1) have been met. Unless the condition is removed, W&LE states that it will have to complete the lengthy historic review process for hundreds of rail properties even though the line sale occurred more than 6 years ago and any future disposition or alteration of rail properties would not be proximately related to the original sale.

In support of its request, W&LE cites the ICC's decision in Wisconsin Central Ltd.--Exemption Acquisition and Operation--Certain Lines of Soo Line Railroad Company, Finance Docket No. 31102 (ICC served Dec. 13, 1995) (Wisconsin Central). There, the ICC removed a similar historic preservation condition after publishing a notice and request for comments in the Federal Register.³

DISCUSSION AND CONCLUSIONS

We will grant W&LE's request and remove the condition subject to the certification requirement set out below. Because the line sale occurred more than 6 years ago, a condition designed to address the effects of that line sale is no longer necessary. Under our present rules, such a condition would apply only to rail properties that are outside the Board's abandonment jurisdiction and that the buyer has immediate plans to alter or dispose of as a result of the purchase. If W&LE disposes of this property in a subsequent abandonment or line sale, the appropriate NHPA review will take place in those proceedings.

Here, W&LE has certified to the SHPOs in the four involved states that the original transaction was for the purpose of continued rail operations where further authority would be required to abandon any service and that W&LE has no plans to alter or dispose of historic properties.⁴ If W&LE's acquisition

³ Although W&LE does not object to a similar two-step notice and comment procedure, we do not believe it is necessary in view of the fact that W&LE also has advised each SHPO that it believes 49 CFR 1105.8(b)(1) applies, and our requirement set out below that W&LE notify each SHPO of our decision to remove the historic preservation condition at this time. Any objection to our removal of the condition can be heard in a petition seeking reopening or reconsideration.

⁴ Thus, we do not expect to grant this petition and then hear that one or more of the historic structures subject to the condition has been dismantled. We are relying on W&LE's good faith in representing that it does not plan to alter or dispose of these historic properties at this time. If we hear from any of the SHPOs that such is the case, we reserve the right to reopen this proceeding to review the representations on which we are relying.

were to take place today, the condition would not be imposed. Thus, the 1990 condition is inconsistent with our current procedures. As the ICC noted in Wisconsin Central, supra, the revised historic preservation rules have been applied in numerous cases after 1991 and have worked well in narrowing the focus of the historic review process to rail properties that may actually be affected by the purchase transaction. Therefore, the condition will be removed as requested by W&LE.

To ensure that the involved SHPOs are informed of this decision, we will require W&LE to serve this decision on each SHPO within 5 days of the date of service of this decision and certify that it has done so.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened and the historic preservation condition imposed in 1990 is removed.
2. W&LE must serve a copy of this decision on each SHPO in the involved states within 5 days of the service date of this decision and certify to us that it has done so.
3. This decision is effective 30 days from its date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary